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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1222

CYNTHIA K. MESSER, ADMINISTRATRIX OF THE ESTATE OF JAMES RICHARD BRAEDYN, DECEASED

V.

AMERICAN GEMS, INC.; EMERALD VALLEY CAMPER'S CLUB, INC.; EMERALD VALLEY DISTRIBUTION CORP., INC.; LOIS R. RIST

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Max F. Ferree
William C. Gray, Jr.
Court Square
Wilkesboro, NC 28697
(919) 838-5173

Counsel for Petitioners

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

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The petitioner, AMERICAN GEMS, INC., the sole remaining Defendant in this proceeding respectfully prays that a Writ of Certiorari issue to reveiw the judgment and the opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 3, 1980.

OPINIONS BELOW

The opinion of the District Court for the Western District of North Carolina is unreported and unpublished and appears as Appendix A, infra, pp. 14-26. The opinion of the Court of Appeals, is yet unreported but published, appears as Appendix B, infra, pp. 27-62.

JURISDICTION

The Order or Judgment of the Court of Appeals for the Fourth Circuit was entered on January 3, 1980. See Appendix B, pp. 27, infra. This petition for certiorari was filed less

than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

The Plaintiff-Administratrix of the Estate of James Richard Braedyn, deceased, brought suit in Federal Court for the Western District of North Carolina alleging a cause of action for wrongful death and alleging as grounds for jurisdiction 28 U. S. C., Section 1332. Original Defendants included Lois R. Rist, a citizen and resident of North Carolina, Emerald Valley Camper's Club, Inc. and Emerald Valley Distribution Corporation, Inc., corporations which had at one time existed under the laws of the State of North Carolina but being neither viable nor existing corporations at the time of the institution of the action and American Gems, Inc., a Maryland corporation having its principal place of business

in the State of North Carolina. The Plaintiff-Administratrix Cynthia K. Messer was, at the time of the institution of suit, a citizen and resident of North Carolina.

Prior to the institution of suit in the instant case, the State of North Carolina had repealed a Statute requiring that a wrongful death action be instituted by a personal representative who was a North Carolina resident and permitted a domiciliary personal representative in the State of the decedent's residence to take out ancillary letters, for purposes of bringing the wrongful death action in the name of the non-resident personal representative. The questions thereby arising are: (1) Whether the action of the United States Court of Appeals for the Fourth Circuit in reversing the District Court is in contradiction to the United States Supreme Court decision of Mecom v Fitzsimmons Drilling Co.,

284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931), Kramer v Caribbean Mills, 394 U. S. 823, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969), 28 U. S. C., Section 1332 (a) (1) and 28 U. S. C., Section 1359, when the State of North Carolina does not require that a resident Administrator or a resident Ancillary Administrator represent the interests of non-citizen beneficiaries in a wrongful death action.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

28 U. S. C. A. Section 1332 (a) (1) provides in pertinent part as follows:

> "The District Court shall have original jurisdiction of all Civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and cost and is between- (1) citizens of different states; ..."

28 U. S. C. A., Section 1359 provides:

> "A District Court shall not have jurisdiction of a Civil action which any party, by assignment or otherwise, has

been improperly or collusively made or joined to invoke the jurisdiction of such Court."

Chapter 28 A of the North Carolina General Statutes, Section 28 A-4-2 provides in pertinent part as follows: Persons disqualified to serve as personal representative.

" No person is qualified to serve as a personal representative who: (4) is a non-resident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the Court; or who is a resident of this state who has, subsequent to appointment as a personal representative, moved from the state without appointing such process agent."

Chapter 28 A of the North Carolina General Statutes, Section 28 A-26-3, Ancillary Administration provides in pertinent part as follows:

"(A) Any domiciliary personal representative of a non-resident

decedent upon the filing of a certified or exemplified copy of letters of appointment with the Clerk of Superior Court who has venue under G. S. 28 A-3-1 may be granted ancillary letters in this state notwithstanding that the domiciliary personal representative is a non-resident of this state or is a foreign corporation. If the domiciliary personal representative is a foreign corporation, it need not qualify under any other law of this state to authorize it to act as ancillary personal representative in the particular state. If application is made for the issuance of ancillary letters to the domiciliary personal representative, the Clerk of Superior Court shall give preference in appointment to the domiciliary personal representative unless the decedent shall have otherwise directed in a will."

Chapter 28 of the North Carolina General Statutes, Section 28 A-26-5, Authority of domiciliary personal representative of a non-resident decedent provides as follows:

"The domiciliary personal representative of the non-resident decedent after qualifying as ancillary personal representative in the this state is authorized to administer the North Carolina estate of the non-resident decedent in accordance with provisions of this Chapter."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are as follows: This proceeding originated upon the filing of the Complaint by Cynthia K. Messer, Administratrix of the Estate of James Richard Braedyn, deceased, against American Gems, Inc., Emerald Valley Camper's Club, Inc., Emerald Valley Distribution Corporation, Inc., Lois R. Rist for damages pursuant to the North Carolina wrongful death statute, NCGS 28 A-18-2. The Plaintiff claimed that jurisdiction did lie in the Federal District Court for the Western District of North Carolina relying upon

28 U. S. C., Section 1332 (a) (1). At the time of the filing of the Complaint the Plaintiff was the Administratrix, Cynthia K. Messer, a resident and citizen of North Carolina. Defendant, Lois R. Rist was a citizen and resident of the State of North Carolina. Emerald Valley Camper's Club, Inc., and Emerald Valley Distribution Corporation, Inc. were corporations which had existed under the laws of the State of North Carolina that had ceased operations prior to the date of the filing of the Complaint and American Gems, Inc. was a Maryland corporation with its principal place of business in North Carolina. At the time of the filing of the Complaint, North Carolina did not require that a resident of the State of North Carolina qualify as Administrator or Ancillary Administrator for purposes of brining an action in wrongful death as is indicated by NCGS 28 A-4-2 (4), NCGS 28 A-26-3 (a) and

NCGS 28 A-26-5.

The District Court for the Western District of North Carolina held that the duties of the Administratrix in the instant case were the same as those in Mecom v Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931) and that based upon Mecom and Sadler v New Hanover Memorial Hospital, 588 F. 2d. 914 (4th Cir. 1978) that the citizenship of the Administratrix is controlling and that therefore the case should be dismissed for lack of jurisdiction. Appendix A, infra pp. 26.

The Court of Appeals for the Fourth Circuit relying upon Miller v Perry, 456 F. 2d. 63 (4th Cir. 1972) a case decided when North Carolina required that a resident Administrator or Ancillary Administrator bring a wrongful death action reversed (Appendix B, infra pp. 58.) stating that:

"She bears little resemblance to the general domiciliary Administrator in Mecom, and its holding has no pertinence here."

REASONS FOR GRANTING THE WRIT

Consideration by this Court is necessary on the independent ground that the holding below conflicts squarely with Mecom v Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931) and in substance with Kramer v Caribbean Mills, 394 U. S. 823, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969). The holding below further conflicts with 28 U. S. C. Section 1332 (a) (1) and 28 U. S. C. Section 1359.

The issue raised by this conflict is of continuing importance and should be resolved by this Court.

The holding below that the Plaintiff, Cynthia K. Messer, the Administratrix, and

indeed the only Administratrix ever appointed to represent the decedent's estate in any state is not a real party in interest for purposes of determining whether or not diversity exists is inconsistent with this Court's decidision in Mecom (supra). The holding of the Court of Appeals has further so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The holding by the Court of Appeals will authorize a "case by case" determination as to whether or not the personal representative of a decedent would be a real party in interest. This "case by case" determination would be followed in cases such as the instant case even where there is no artificial attempt to create diversity in violation of 28 U. S. C. Section 1359 as is reflected in Kramer (supra) and in

direct contradiction with Mecom (supra).

In holding that the Administratrix is not a real party in interest in the instant case for purposes of determining whether or not diversity of citizenship exists, the decision below is inconsistent with this Court's decision in Mecom (supra), a case which bears striking parallels to the instant proceeding.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

MAX F. FERREE, P. A.
Attorney for Petitioners
Court Square
Wilkesboro, NC 28697
(919) 838-5173

By: _____
Max F. Ferree

By: _____
William C. Gray, Jr.

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this the 7th day of February, 1980, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D. C. and have mailed the required copies of said petition for Writ of Certiorari to Creighton W. Sossomon, P. O. Box 188, Sylva, North Carolina 28779.

Max F. Ferree
Attorney for Petitioners

IN THE

Supreme Court of the United States

NO.

Cynthia K. Messer, Administratrix of the Estate of James Richard Braedyn, deceased

V.

American Gems, Inc.; Emerald Valley Camper's Club, Inc.; Emerald Valley Distribution Corp., Inc.; Lois R. Rist

APPENDIX A

MEMORANDUM AND ORDER

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
ST-C-78-28

CYNTHIA K. MESSER, Administratrix of the Estate of JAMES RICHARD BRAEDYN, Deceased Plaintiff	)	
vs	)	MEMORANDUM AND ORDER
AMERICAN GEMS, INC., EMERALD VALLEY CAMPER'S CLUB, INC., EMERALD VALLEY DISTRIBUTION CORPORATION, INC. and LOIS R. RIST Defendants	)	

Plaintiff brought this action as the personal representative of the deceased seeking damages for his wrongful death as proscribed by North Carolina General Statute (NCGS) Secion 28A-18-2. Diversity of citizenship is the alleged basis for jurisdiction. The Defendants filed a Motion for Summary Judgment. A hearing was conducted on this matter in Asheville on December 28, 1978

and after careful consideration of the pleadings, affidavits, interrogatories, briefs and arguments of counsel the Court now enters its findings and conclusions.

The deceased along with a man named Delmus Joseph Harrison were killed when a ditch in which they were mining caved in and suffocated them. Plaintiff was mining on the Defendant's property.

In support of their motion for summary judgment the Defendants contend that Delmus Joseph Harrison was never employed by them nor was he authorized to be their agent. They further allege that under the law Harrison had no apparent authority to act as their agent. In short, they allege and offer the affidavit of Lois R. Rist to prove that any negligence which may have occurred was caused by Harrison alone and that it cannot be attributed to

them under any theory.

The Plaintiff responded by alleging that the deceased had paid the Defendants for the assistance of Harrison in digging an area with a backhoe in addition to the regular admittance fee (Complaint #6). The Plaintiff also answered an interrogatory to the effect that Harrison's services were available on and about the premises at the consent and direction of the Defendants. Further the Plaintiff named several witnesses who may testify at trial concerning the circumstances related to obtaining Harrison's services to operate the backhoe (Plaintiff's Answers to Defendants' First Set of Interrogatories #9, 10).

Summary judgment is not appropriate if there are any material facts in dispute. Certainly Harrison's role is a material fact which must be settled before liability, if any, can be determined. Therefore, the Defendants' motion must be denied

at this time.

The Defendants initially challenged the validity of the appointment of Cynthia K. Messer as the administratrix of the decedent's estate. While the Defendants have abandoned their challenge of the appointment as well as to her ability to bring this action, the Court sua sponte questions whether or not the Plaintiff can meet the jurisdictional prerequisites to maintain this action. Plaintiff's sole basis for subject matter jurisdiction is diversity of citizenship. The administratrix in whose name the action was brought is a citizen of North Carolina. The Defendant, American Gems, Inc., admits to operating a business in North Carolina. The Plaintiff alleges that the real parties in interest upon whose citizenship diversity should be based are Mrs. Dorothy M. Braedyn, widow of the deceased and his minor children, Patricia D. Braedyn, Kathryn D. Braedyn, James

M. Braedyn and Donald A. Braedyn, who are all residents of Plantation, Florida.

A recent case decided by the Court of Appeals of the United States for the Fourth Circuit seems to indicate that under the facts in this case, the citizenship of the administratrix would control and cause diversity jurisdiction to be defeated. Sadler v. New Hanover Memorial Hospital, Inc., No. 77-2444, decided December 20, 1978. In Sadler the defendant was a citizen of North Carolina and the executrix was a citizen of Virginia. However, the beneficiaries were citizens of North Carolina. In upholding the district court's decision that it had jurisdiction, based upon the citizenship of the executrix, the Fourth Circuit referred to Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84 (1931) which long ago reaffirmed the general principle that when an action is required to be brought in the name of an

administrator, who must account faithfully for any recovery to the beneficiaries, the administrator of the real party in interest and his citizenship rather than that of any beneficiary should be considered to determine if there is diverstiy.

The Fourth Circuit qualified its reliance upon Mecom noting that in Miller v. Perry, 456 F. 2d 63, 65 (4th Cir. 1972) it had determined that Mecom did not announce a constitutional or inflexible criterion for the ultimate determination of diversity. The court in Sadler further quoted from Miller noting that prior cases authorized "attention to the substantive relation of the administrator, the beneficiaries and others to the controversy before an undiscriminating decision that the citizenship of a representative controls the determination of diversity jurisdiction." Sadler, p. 6. According to Sadler, the Miller decision was based in part upon the Supreme Court's holding in Kramer v.

Caribbean Mills, Inc., 394 U. S. 823, 89 S. Ct. 1487 (1969).

In Kramer the court held the assignment of claims to create diversity jurisdiction was ineffective under the provisions of 28 U. S. C. Section 1359 which prohibits jurisdiction when "any party by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." The Court reserved the questions involving suits required to be brought by administrators or guardians and did not determine whether such situations would be controlled by Section 1359. 89 S.Ct. 1490 fn. 9. The Court's reservation of these issues was considered by the court in Miller to be authority to examine the substantive relationship between the administrator, beneficiary and defendants. The court in Sadler noted that using this approach it had decided four cases "forging exceptions to

the literal Mecom rule." Sadler, p. 6.

In examining the four cases Miller v. Perry, 456 F. 2d 63 (4th Cir. 1972), Bishop v. Hendricks, 495 F. 2d 289 (4th Cir.1974), cert. denied, 419 U. S. 1056, 95 S. Ct. 639 (1974), Vaughan v. Southern Railway Co., 542 F. 2d 641 (4th Cir. 1976) and Mullins v. Seals, 562 F. 2d 326 (4th Cir. 1977), the trend was to look to the beneficiaries' citizenship determining diversity. One reason for this which was frequently cited was the lack of any stake in the outcome by the personal representative. In three cases, Miller, Vaughn and Mullins, the state law required resident administrators to initiate the actions. The court felt that in such instances the administrators were merely "straw parties" providing a nominal plaintiff for the purpose of maintaining the action under state law. Bishop, 495 F. 2d at 296.

There is also approval by the Court of the American Law Institute's proposal that the citizenship of the decedent be attributed to any representative authorized to bring an action for wrongful death. Miller, 456 F. 2d at 68.

In Vaughan, the court declared that one of the guiding principles was whether or not the administrator had something more than a nominal interest at stake in the litigation, regardless of the motive behind his appointment. 542 F. 2d 643. The court in Vaughn also reviewed the effect of 28 U. S. C. A. Section 1359 and the situation in which a state required a resident administrator to bring the action. In analyzing the facts in Vaughn in light of these principles the Court disregarded the administrator's citizenship and looked to the citizenship of the beneficiaries and dismissed the case for lack of jurisdiction. There the defendant was a Virginia corporation, and the

deceased a resident of Virginia. Further the mother of the deceased, a resident of Virginia, qualified as the administratrix in Virginia. The plaintiff was appointed solely in order to bring the action in North Carolina as was required by state law.

In Mullins the court again followed Miller and dismissed for lack of diversity because the beneficiaries and the defendant were residents of the same state. The citizenship of the administrator was disregarded. The court in Mullins made no analysis of the facts stating merely that under Miller the citizenship of the beneficiaries rather than that of the administrator, who was appointed merely for the purpose of bringing the action, controls in determining whether there is complete diversity. Mullins at 328. Thus, since 1972 the effect of the decisions by the Fourth Circuit has been to create a rule in which the citizenship of

the beneficiary rather than the personal representative has been determinative of the issue of diversity.

Currently in Sadler te court swings back to the general rule as set forth in Mecom stating that the four cases, Miller, Bishop, Vaughn and Mullins have all provided exceptions. Looking then at the present case, unless an exception to Mecom is found, the citizenship of the administratrix, North Carolina, would defeat jurisdiction since the Defendant American Gems, Inc. is a citizen of the same state. The exception in Miller, Vaughan and Mullins, where a resident administrator was required to be appointed to bring a wrongful death action is not present since North Carolina now allows non-resident administrators to qualify to bring such suits. See NCGS Sections 28A-4-1, 2; 28A-18-2; 28A-26-3, 4, 5, 6. Under current North Carolina law,

the administrator could just have easily been a resident of Florida and still brought the action. These facts would present no question of diversity since the administrator and beneficiaries would be residents of Florida and the Defendants residents of other states. While the personal representative in this case is an administratrix rather than an executrix there would be no reason to suspect collusion, another exception, since a Florida administrator could have been appointed.

In examining the duties of the administratrix in the instant case, they are the same as those in Mecom. While the Plaintiff's attorney indicated that the only assets of the decedent's estate would be the damages, if any, awarded in this suit, the administratrix has the same duty as the one in Mecom. She is the only personal representative who has been appointed

in any state. She must conduct or settle the lawsuit and would be liable upon her official bond for failure to act with diligence and fidelity. Mecom, 52, S. Ct. at 86. See NCGS Sections 28A-13-10, 28A-23-3. Based upon Mecom and Sadler the Court concludes that the citizenship of the administratrix is controlling and therefore the case should be dismissed for lack of jurisdiction.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment be and the same is hereby denied. Further, IT IS ORDERED that the Plaintiff's action be and is hereby dismissed. The Clerk is directed to send a copy of this Memorandum and Order to the attorneys for the parties.

This the 23rd day of February, 1979.

s/ Woodrow W. Jones
Chief Judge

IN THE

Supreme Court of the United States

NO.

Cynthia K. Messer, Administratrix of
the Estate of James Richard Braedyn, deceased
Appellant

V.

American Gems, Inc.; Emerald Valley
Camper's Club, Inc.; Emerald Valley
Distribution Corp., Inc., Lois R. Rist
Appellees

APPENDIX B

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Woodrow W. Jones, Chief Judge.

Argued: December 7, 1979
Decided: January 3, 1980

Before BRYAN, BUTZNER and MURNAGHAN, Circuit Judges.

Creighton W. Sossomon for Appellant; William C. Gray, Jr. (Max F. Ferree, P. A. on brief) for Appellees.

MURNAGHAN, Circuit Judge:

On July 11, 1979, James Richard Braedyn, a non-resident of North Carolina,[1] was killed in an accident on the North Carolina Premises of the sole remaining defendant, American Gems, Inc. American Gems, Inc., a Maryland corporation, because it had its principal place of business in North Carolina, was a citizen of North Carolina for purposes of determining whether there was diversity jurisdiction.[2]

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1 The record establishes that James Richard Braedyn was a non-resident of North Carolina and that his widow and minor children were residence of Florida. It is immaterial for our purposes whether James Richard Braedyn was also a Florida citizen. The controlling consideration is that neither he nor those entitled to benefits if his death was wrongful were North Carolina citizens.

2 28 U. S. C. Section 1332 (c).

The district court accepted, for purposes of the ruling it made, and so do we, the representation that decedent had no assets subject to administration, and that the claims for wrongful death were the only ones which would be asserted by an personal representative.[3] The rule that claims for wrongful death, while not constituting assets of the true estate, must be asserted by a personal representative applies both in North Carolina, N.C.G.S. Section 28A-18-2, and in Florida, Fla. Stat. Section 768.20 (Supp. 1978).

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3 The representation runs somewhat counter to allegations in the complaint, (a) that only a small portion of decedent's 1974 salary of $19,500 was used to defray his personal living expenses and (b) that the decedent was prudent, industrious and thrifty, was accumulating property and assets and had a reasonable

The widow did not seek primary administration in Florida, or any administration in North Carolina. It appears that she left to North Carolina counsel retained to pursue the wrongful death claims the taking of all necessary steps. With the statute of limitations about to run,[4] counsel obtained letters of administration for Cynthia K. Messer, a member of his office staff and a resident of North Carolina, in whose name, as administratrix, the action in the United States District Court for the Western District of North Carolina was filed. Cynthia K. Messer had no other acquaintance or relationship with those entitled to claim wrongful death benefits because of the death of James Richard Braedyn.[5]

The district judge raised sua sponte the

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3 (cont'd)
expectancy of acquiring a substantial accumulation of wealth. However, for reasons set out subsequently in this opinion the existence of other assets, unless they were located in North Carolina, would not affect the result. Since defendant, in its answer, alleged that the decedent did not leave any property or assets in Buncombe County, and none have come into Buncombe County, the matter probably is of no moment. However, if the defendant can establish that there were in fact substantial North Carolina assets other than the wrongful death claims requiring administration and that the North Carolina administrator who is the plaintiff has a duty to administer them, nothing would preclude reexamination by the district court of the jurisdictional question in light of such circumstances.

4 Suit in the United States District Court for the Western District of North Carolina was instituted on July 11, 1978, the second anniversary of the injury which occasioned James Richard Braedyn's death, and the last day for filing before the limitations period expired. N.C.G.S. Section 1-53.

5 The circumstances of the choice of Cynthia K. Messer as administratrix and her lack of other connection with the potential beneficiaries were not stated in the record. However, counsel for the defendant, with commendable candor, admitted at oral argument that the representations on those scores by counsel for the plaintiff were correct.

question of whether the citizenship of the administratrix or the citizenship of the beneficiaries controlled for purposes of determining diversity jurisdiction. He held that the citizenship of the administratrix controlled and dismissed for want of jurisdiction.

Prior to 1975, a statute of North Carolina, N.C.G.S. Section 28A-8-2, required that a wrongful death action, particularly one growing out of the death of a non-resident, be instituted by a personal representative who was a North Carolina resident. Since 1975 a non-resident has not been precluded by North Carolina law from qualifying as an administrator or ancillary administrator and brining a wrongful death action. N.C.G.S. Section 28A-4-2 disqualifies a non-resident only if he or she fails to appoint a resident to accept service of process. N.C.G.S. Section 28A-26-3 (a) permits a domiciliary

personal representative in the state of the decedent's residence to take out ancillary letters, although a non-resident of North Carolina.

Had those changes in the statutory law of North Carolina not taken place, clearly diversity jurisdiction existed. Miller v. Perry, 456 F. 2d 63, 68 (4th Cir. 1972) dealt with a situation identical with the instant case in all respects save one. The difference lay in the fact that the decedent's father took out domiciliary letters of administration in Florida, the state of residence of the decedent and of the father, and the decedent's grandfather, a North Carolina resident, solely because of the then extant statutory requirement, qualified in North Carolina as ancillary administrator and instituted the North Carolina wrongful death action in the United States District Court for the Eastern District of North Carolina. Chief Judge Haynsworth, speaking for the Court, held:

> We conclude, therefore, that in determining the presence of diversity of citizenship when state law requires that the action be prosecuted in the name of a resident administrator, the citizenship of the beneficiaries, rather than that of the administrator, is relevant, and that such diversity is present here.

Other decisions of this Court, in related circumstances, make clear that the result should not be different simply because the named plaintiff is an administrator of a non-resident decedent rather than an ancillary administrator. The role, in either case, is that of a nominal party, and attention should be focused on the beneficiaries, the parties to whom the outcome will be significant. Such was the holding in Lester v. McFaddon, 415 F. 2d 1101, 1103-4 (4th Cir. 1969). In that wrongful death action brought in the United States District Court for the District of South Carolina, the beneficiaries and defendants were all South Carolina residents. The decedent had died a

South Carolina domiciliary. A Georgia attorney was appointed South Carolina administrator (not ancillary administrator) for the purpose of bringing the wrongful death action. No contention was made in the district court or on appeal that diversity jurisdiction was lacking. On appeal, after a full trial on the merits below, this Court raised the jurisdictional issue sua sponte, and determined that the purely nominal role of the administrator made it inappropriate to measure diversity on the basis of his citizenship. Rather the citizenship of the beneficiaries was deemed controlling. Again Chief Judge Haynsworth spoke for the Court:

> In the circumstances of this case the administrator has no stake in the litigation. In South Carolina an action for wrongful death may be maintained only by an executor or administrator of the decedent's estate. The cause of action inheres in the personal representative, and the statutory beneficiaries cannot proceed in their own names. Any amount recovered, however, does not go into the decedent's general estate but is payable, upon receipt by

the personal representative, directly to the statutory beneficiaries, here the decedent's numerous children. Had there been assets in the general estate of the decedent, the administrator would have been required to administer them, but there were no such assets here so that this administrator has as yet had no duties to perform.

Unless there is a recovery of some damages in the wrongful death action, the administrator here would never have anything to do; if there is a reovery, his duty is limited to receipt of the funds and their disbursement to a guardian of the statutory beneficiaries. He, of course, has a fiduciary duty to see that the litigation is pressed to a conclusion as long as there is any reasonable expection of a recovery, but when the foreign administrator is procured by the lawyers handling the litigation he can hardly be expected to ride herd upon them or exercise any effective supervision of their conduct of the litigation. Except that he acquired his authority from the South Carolina Probate Court, he has no greater standing than the next friend of a minor or incompetent or a guardian ad litem whose residence has not been thought to be controlling of the question of diversity.

Such a person is indeed a, "straw party"....

The result was further buttressed, in Chief Judge Haynsworth's view, because appointment of the diverse Georgia resident was "an improper manufacture of jurisdcition", and therefore, within the prohibition of 28 U. S. C. Section 1359.[6]

Bishop v. Hendricks, 495 F. 2d 289 (4th Cir. 1974) on facts virtually indentical to those of Lester likewise reached the result that there was no diversity jurisdiction even though there was the significant difference from Lester that the lower court determined that the motive for the securing of a South Carolina appointment of a Georgia resident as general administrator "was not the creation of federal jurisdiction".

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6 "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

In Bishop, the Court, while alluding to Lester, did so mainly to minimize the suggestion that a finding of collusive motive was necessary in order for a court to disregard the citizenship of a general administrator, and look instead to those who would benefit from any wrongful death recovery. The Court primarily based its result on Miller and particularly the holding "that when the responsibilities of the administrator are solely to institute the wrongful death action -- when he is what one Court was described as 'an administrator ad litem' and no more -- the Court would 'hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative.'" 495 F. 2d at 291-92. It was the administrator's status as "an agent to sue 'without stake' in the litigation" which was deemed controlling. The Court acknowledged that the citizenship of a

general administrator might be controlling "when a general administrator, having assets other than the wrongful death suit to administer and who, incidental to his duties as general administrator, files a wrongful death suit...." Id. at 295.

However, Judge Russell explained that the general administrator in Bishop was not in such a position, 495 F. 2d at 295-6:

> In this case, the administrator has failed to establish any substantive facts or to assign any valid reasons for this appointment that would give "substance' to his representation or fix his status in the suit as different from nominal. Without any 'real (or) substantial interest in the outcome of the litigation', he possesses 'no stake in the litigation'. He has nothing to gain by the suit save a fee for the use of his name if successful, and, if the suit is lost, nothing to lose. In fact, it would seem that the beneficiaries of the action, if they chose to, could settle the action, with or without consulting him. Nor is the prosecution of the action incidental to any general fiduciary duties of an administrator. There are no assets in the estate other than this suit. The

> appellant has no knowledge of the accident out of which the litigation arose and can contribute nothing to its prosecution. He actually had no part in the selection or employment of counsel.

Judge Russell might have been describing the administratrix in the instant case.

In this connection, it would appear that, applying the Bishop rationale to the instant case, the test would be whether there existed assets in North Carolina for the North Carolina general administrator to gather in and apply and distribute. Assets which may exist in Florida would not appear to affect the situation since the North Carolina statute does not appear to contemplate what would be an unusual extension of the authority of an administrator for a non-resident decedent, even though he be appointed a general administrator, to allow him to administer assets located outside North Carolina. N. C. G. S.

Section 28A-3-1 speaks of administration in North Carolina for a decedent domiciled elsewhere in terms of property or assets located in the county where the administration is sought, and of priority for the county where proceedings for probate are first commenced where property or assets are located in more than one North Carolina county. So demonstration that the non-resident decedent had assets elsewhere than in North Carolina would not expand the role of the North Carolina administrator, even though he be a "general" rather than merely an "ancillary" administrator.

Vance v. Southern Ry. Co., 138 N. Car. 460, 464 50 S. E. 860, 862 (1905) reinforces that conclusion. There the father of Tennessee domiciliary killed in an accident in North Carolina took out letters of administration in North Carolina. At the time he did so, no letters has been obtained

in Tennsessee. The grant of letters to the father, therefore, could not be "ancillary", but were as "general" as those issued in this case to Cynthia K. Messer. Subsequently, the decedent's widow was made administratrix of his estate in Tennessee. In those circumstances the North Carolina Supreme Court treated the creation of the status of general administrator as essentially the same as an appointment as an ancillary administrator:

> We therefore hold that the statute creating the right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court of the county where the intestate was killed in granting administration for the purpose of enforcing such right of action." (Emphasis supplied).

Thus it appears that Cynthia K. Messer's status as administrator, rather than as ancillary administrator, of a non-resident decedent, is of

no significance to the problem. Miller is on all fours with the present case, unless the intervening change in the North Carolina statute to permit non-residents to act as personal representatives would cause a different result. In our opinion, it clearly does not.

Subsequent to the decisions in Lester, Miller and Bishop, this Court had before it Vaughn v. Southern Ry. Co., 542 F. 2d 641 (4th Cir. 1976). The case concerned a fatal accident in North Carolina to a Virginia resident. The person causing the death was a Virginia citizen. The decedent's mother, who would be the beneficiary of any recovery for wrongful death, also resided in Virginia. She qualified as administratrix in Virginia for purposes of bringing suit for wrongful death. North Carolina law still required that the personal representative bringing a wrongful death action be a North

Carolina resident, and such an individual took out letters of ancillary administration. He then sued in the Eastern District of North Carolina.

A dismissal for lack of diversity jurisdiction was held to be proper. Chief Judge Haynsworth, for the majority, distilled the essence of Lester, Miller and Bishop to conclude that the citizenship of the North Carolina administrator was not what controlled, but rather the citizenship of the beneficiary of the wrongful death claim. Chief Judge Haynsworth specifically stated that such was the test, unaffected by whether, as in Lester, there was any attempt at "an improper manufacture of jurisdiction". He acknowledged that the North Carolina statutory requirement that the personal representative be a North Carolina resident made the purity of the motive of the Virginia administratrix and beneficiary beyond question. The controlling factor was nevertheless the nominal

nature of the position of the North Carolina administrator. His lack of a stake in the outcome made reference to his citizenship for purposes of determining whether there was diversity jurisdiction "artificial and shadowy". To be consistent with Vaughn, we, in the present case, should obviously look to the Florida citizenship of the beneficiaries and hold that diversity existed. The statutory requirement did not confer substantiality on the position of the administrator sufficient to require resort to his citizenship for purposes of deciding whether diversity jurisdiction existed. With the statutory requirement abrogated, there is even less substantiality.

The majority's conclusion in Vaughn that there was on jurisdiction since the potential beneficiary and the defendant were not diverse drew a dissent from Judge Butzner.[7]

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7 Support for the position of the dissent has

Judge Butzner expressed the view that, since the State law compelled the designation of a North Carolina resident as administrator to bring suit, and since there was no collusion to manufacture diversity jurisdiction, deference to State law should be shown. The State law made a North Carolina resident an indispensable party, and as such his status was substantial; hence his citizenship should be determinative for diverstiy jurisdiction purposes. The rationale of the dissent, of course, is that the statutory requirement is necessary to create substantiality of status. The corollary would be that the elimination of the statutory requirement that the administrator he a North Carolina resident would enhance, not detract from, a conclusion

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7 (cont'd)
subsequently been expressed by Judge Bryan. Mullins v. Seals, 562 F. 2d 326, 329 (4th Cir. 1977).

that Cynthia K. Messer, as administratrix, was a purely nominal party. Hence, in the instant case, Judge Butzner's dissent would, as much as Chief Judge Haynsworth's majority opinion, dictate a ruling that there was diversity of citizenship. The amendment of the North Carolina statute removing the requirement that a North Carolina resident be the personal representative ended the only even arguable basis for a conclusion that the North Carolina administrator of a non-resident, qualified solely to bring a wrongful death action in North Carolina, has anything more than a nominal status.

Next came Mullins v. Seals, 562 F. 2d 326 (4th Cir. 1977) where again the wrongful death claim beneficiaries and the defendant were citizens of the same state, either Missouri or North Carolina. Suit was brought in a Virginia state court by a Virginia resident who qualified

as administratrix of the decedent. There was a Virginia statute creating a residency requirement for the personal representative similar to that formerly existing under North Carolina law. The case was removed to the United States District Court for the Western District of Virginia. This Court, relying on Miller, held that the citizenship of the beneficiaries was controlling of an administratrix appointed merely for the purpose of bringing the action. Again the statutory requirement that the plaintiff in a wrongful death action must be a resident was deemed insufficient to require reference to the nominal plaintiff's citizenship. Thus remand to the Virginia state court was directed.

The latest approach to the subject matter by this Court occurred in Sadler v. New Hanover Memorial Hospital, Inc., 588 F. 2d 914 (1978). There a sister of the decedent named as the

executrix in the decedent's will brought a wrongful death action in the Eastern District of North Carolina. The sister was a Virginia resident. The decedent was a North Carolina resident, as were the beneficiaries who would receive any recovery for his wrongful death. The defendant was a North Carolina corporation. Relying on the fact that the plaintiff was an executrix, who, under North Carolina law, was entitled, though a non-resident, to qualify in that domiciliary state and thus act as the manager of the decedent's entire estate, the Court, speaking through Judge Winter, determined that the plaintiff's stake was substantial, and so her citizenship should control. Accordingly, diversity jurisdcition was held to exist. The Court, consequently, was simply acknowledging, as Judge Russell had indicated in Bishop, that, where the personal representative who has been appointed by the decedent's

domiciliary state, and therefore is in a position to manage the decedent's entire estate, has other duties to perform than merely the prosecution of the wrongful death claim and the payment of any recovery directly to the statutory beneficiaries, the personal representative may have so substantial a role to play that his or her citizenship should be the relevant consideration for purposes of deciding whether diversity jurisdiction exists.

Judge Winter relied on the entirely reasonable probability that someone named executrix in the decedent's will, well before the unanticipated death,[8] will have substantial duties to perform, and so will not merit the description as a nominal party.

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8 While death is always to be expected, in an unspecific way, the time, place and circumstances ordinarily are not. The decedent, divorced from his wife, in taking the altogether reasonable step of naming his sister as executrix could not be charged with

In the absence of a showing by the defendant that the wrongful death claim was the sole asset with respect to which the executrix would have any duties, the Court correctly proceeded on the opposite assumption.

In his opinion in Sadler, Judge Winter also pointed to a presumption of collusion in Bishop, since there the domiciliary administrator was only designated after the decedent's death, when jurisdictional maneuvering for purposes of a wrongful death action was far more probable than when a will was being executed in the decedent's life time, prior to the fatal injury on that score, the instant case presents no problems of possible collusion. The widow of James Richard

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8 (cont'd)
prescient plotting to achieve diversity jurisdiction should he die in circumstances giving rise to a wrongful death claim.

Braedyn, as a Florida citizen, could perfectly properly have qualified as the administratrix, and thereupon filed an action in the United States District Court for the Western District of North Carolina. The selection of a North Carolina resident as administratrix who would file suit was the very opposite of collusive.

The relevance of collusion for diversity jurisdiction purposes is only that its presence will serve to defeat jurisdiction if, otherwise on the facts presented, diversity jurisdiction would be said to exist. Judge Winter in Sadler was simply pointing out that, if the general domiciliary administrator in Bishop should ordinarily have been treated as a party with a substantial stake, nevertheless a presumption of collusion arose from the fact that a non-resident was selected, after the decedent's death, and with filing of a wrongful death action looming on the horizon,

when a resident of South Carolina was a much more likely choice. The presumption was not overcome, but indeed confirmed by the evidence in Bishop that the filing of the wrongful death action was the sole raison d'etre for an administrator's appointment.

Here there clearly was no collusion, and so nothing inhibits referral to the citizenship of the beneficiaries rather than to the citizenship of a purely nominal administratrix with no stake in the matter.

Thus, the contention of the defendant, American Gems, that the repeal of the statutory requirement of a North Carolina resident as the personal representative who is to bring the action renders Miller v. Perry inapplicable as authority in this case misses the mark. The importance of the former statutory requirement in the cases in this Circuit has solely been

to indicate that, where a North Carolina citizen has, as a consequence of the statutory requirement, been a plaintiff, and the defendant has been a citizen of some other state, if diversity jurisdiction would otherwise exist it will not be denied on grounds of collusive choice of a diverse plaintiff in violation of 28 U. S. C. Section 1359. The answer to the controlling question, whether there are other assets to administer or duties to perform which would make the role of the administrator substantial rather than nominal, is not affected by whether appointment of a local resident as administrator is statutorily required. Indeed, as Judge Butzner's dissent in Vaughn makes crystal clear, the repeal of the statutory requirement reduced the substantiality of the position of the administratrix. In the present case it eliminated any reason for saying that her position was other than nominal.

Plaintiff here being plainly non-collusive, having no stake in the matter, being appointed only to fulfill the North Carolina statutory requirement that still remains, namely that suit be brought by someone who was qualified as a personal representative, the beneficiaries have all the substantive interest in the case. Their citizenship controls, and confers diversity jurisdiction.[9]

Finally, there is left for disposition defendant's argument that this case represents a further departure from the rule in Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931) than justified by our prior holdings in Lester, Miller, Bishop, Vaughan, Mullins and Sadler.

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9 In view of this conclusion, we need not consider whether a determination that there was no jurisdiction should only be applied prospectively and not in this case. Cf. Lester v. McFaddon, 415 F. 2d 1101, 1106

In Mecom the widow of the decedent took out domiciliary administration of his estate. She and her children, as beneficiaries of any wrongful death recovery, were diverse in citizenship from the defendant. Three times she initiated actions in state courts. Each time, upon removal to the appropriate United States District Court, she dismissed her case. Finally, she resigned as administratrix in favor of an individual who had the same citizenship as the defendant. He sued in state court, there was a prompt removal, and remand was denied on the grounds that the

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9 (cont'd)
(4th Cir. 1969). Nor need we address the question of whether a remand would be appropriate to permit substitution as party plaintiff of the widow, following her qualification as administratrix in place of Cynthia K. Messer, thereby establishing beyond any peradventure of doubt the existence of diversity jurisdiction. See McNamara v. Kerr-McGee Chemical Corp. 328 F. Supp. 1058 (E. D. N. C. 1971); but see Reynolds v. Floyd Cotton Mills, 177 N. C. 412, 99 S. E. 240 (1919).

substitution of the plaintiff for the widow as administrator was fraudulent and collusive. The Supreme Court reversed, on the grounds that the personal representative's citizenship controlled, and that his selection because his citizenship would defeat jurisdiction was not relevant.

This Court has held in Miller, 456 F. 2d at 65-6:

> "Mecom, however, did not decide that the citizenship of the personal representative in wrongful death criterion for ultimate determination of diversity. Its assumption was that the personal representative was clothed with such responsibilities and authority that he, under federal standards, was the real party in interest. That assumption has been greatly undermined by the recent recognition in Kramer v. Caribbean Mills, 394 U. S. 823, 89 S. Ct. 1487, 23 L.Ed.2d 9, that the duties and responsibilities of administrators should be taken into account in federal determinations of the relevancy of the citizenship of such a personal representative to the presence of diversity jurisdiction.

Kramer's recognition of a need to re-examine Mecom, and the relevance of the roles of administrators, frees us

from a blind invocation of Mecom's result." The erosion of Mecom occasioned by the several decisions from Lester through Sadler has quite sufficed to render it inapplicable here. Indeed, it is distinguishable in a way which would support reference to the Braedyn beneficiaries rather than to Cynthia K. Messer to determine citizenship. Mecom involved a general domiciliary administrator. As Sadler indicates, a general domiciliary administrator is closely akin to an executor, and so presumptively has a substantial stake in a wrongful death action which he initiates. The presumption will be overcome, or more properly, the presumed fact, even if abundantly proven, will not be given weight where the person serving as general domiciliary administrator was chosen to create diversity jurisdiction. In Mecom departure from the presumption was not warranted because the

selection of the substitute general domiciliary administrator was for the purpose of defeating diversity jurisdiction.[10] 28 U. S. C. Section 1359 attaches no consequences to steps taken to defeat diversity jurisdiction. In our case, we have a non-domiciliary administratrix, appointed solely to bring the wrongful death action. She bears little resemblance to the general domociliary administrator in Mecom, and its holding has no pertinence here. By determining that there is diversity jurisdiction, we further the goal of

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10 See Vaughan, 542 F. 2d at 644: "Mecom, however, dealt with a case in wiich the administrator had been selected because his citizenship was not diverse. The effort was not collusively to create federal jurisdiction, but to defeat it."

such jurisdiction: "the protection of the non-citizen who is obliged to sue or be sued in the state of his adversary." Miller, 456 F. 2d at 67.[11]

REVERSED AND REMANDED.

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11 As in Miller, id p. 68:

> We approach, without achieving, the purpose of the proposal of the American Law Institute. It proposes a more satisfactory solution. It would attribute the citizenship of a decedent to any representative authorized to bring an action for his wrongful death. That proposal would avoid problems which may arise if the beneficiaries are of diverse citizenship or if their citizenship is different from that of their decedent, or if the problem arises in a dissimilar context from that presented here. It recognizes that if an action for personal injury by a surviving victim is appropriate for federal adjudication, the interstate character of the controversy is not significantly affected by his death from his injuries. Its rule is one which may be simply and economically administered to reach a rational conclusion.
>
> That expression of preference for the A. L. I. proposal is echoed in Judge Butzner's dissent in Vaughan. In Miller, the view was taken that substitution of the simpler, more equitable rule proposed by the

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11 (cont'd)

> A. L. I. proposal would have dictated, albeit the path is far more winding and fraught with potential turnings into dead ends of irrationality, this is not the case in which to consider whether, in the continued absence of a statute, the time has come for us, on our own, to bring order out of potential chaos. In the future, however, we wish to alert the Bar to our perception that the cases have heretofore exalted facts which have no real pertinence and created situations pregnant with the possibility of decisions turning on irrelevancies. Suc situations are to be avoided where possible, to prevent the bringing of the law into disrepute.
>
> The presence of a personal representative on the wrongful death scene is, in one important respect, an aberration, for a recovery belongs not at all to the estate but directly to the statutorily designated beneficiaries. He is only a stakeholder, designated solely to prevent confusion as to who may sue and to obviate situations where benefits might otherwise be lost. At the same time, his selection derives from his identity with the decedent, the source of all rights created by a wrongful death statute. Without intimating that we should or can effect the change simply by judicial pronouncement, we, nevertheless. want it known that, if a case arises which presents the question in a way that its answer will affect the outcome, we shall expect the

11 (cont'd)

issue of the applicability of the A. L. I. proposal to be raised and fully presented.

In connection, it should be observed that the A. L. I. proposal involves two steps: (1) the total eliminatin of the citizenship of the personal representative (executor, domiciliary administrator, foreign administrator or ancillary administrator) as a factor in determining whether diversity exists, and (2) the isolation of the decedent's citizenship as the sole factor to consider. The first of these steps is not a great one for a court to take, and but for the decision in Sadler nothing in the decisions of this Circuit would constitute an obstacle. Mecom has been limited and distinguished to the point that it likewise presents no substantial hurdle. The step would merely require acknowledgment that a personal representative, when bringing a wrongful death action, is a distinct, different fiduciary from the fiduciary who gathers the estate assets, pays the debts and administration expenses, and makes distribution of the assets of the true estate. The situation if akin to that of the same person named as executor and trustee in a will, or trustee of two different trusts created in the same testamentary instrument. Courts customarily treat the two guises as separate and distinct. We might, on full consideration in the appropriate case, conclude that the approach heretofore as a single fiduciary, both in his guise as

11 (cont'd)

the initiator of a wrongful death action. Once we separate the two roles, the personal representative, wherever on the spectrum from domiciliary executor through ancillary administrator he falls, can uniformly be said to be a purely nominal party when performing the statutorily assigned function of prosecuting a wrongful death claim.

The second step under the A. L. I. proposal is a more difficult one. The beneficiaries, not the decedent, are the initial owners of the claim for wrongful death. However, the case may be a long time in coming which would require us to contemplate the second step. Family circumstances in these United States are still such that, more often than not, the beneficiaries will together have but a single domicile and it will be indentical with that of the decedent. Even if beneficiaries reside in several states, or together reside in a state different from that in which the decedent resided, it will require a special concatenation of circumstances, related to the citizenship of the defendant or defendants, before the need to consider that second step will arise. Sufficient to that day will be the evils thereof.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79 - 1222

CYNTHIA K. MESSER, ADMINISTRATRIX OF THE ESTATE OF JAMES RICHARD BRAEDYN, DECEASED

V.

AMERICAN GEMS, INC.; EMERALD VALLEY CAMPER's CLUB, INC.; EMERAL VALLEY DISTRIBUTION CORP., INC.; LOIS R. RIST
Petitioners

BRIEF IN OPPOSION TO PETITION FOR CERTIORARI

Creighton W. Sossomon
4 West Main Street
Post Office Box 188
Sylva, North Carolina 28779

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

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The Respondent, Cynthia K. Messer, Administratrix of the estate of James Richard Braedyn, deceased, the Plaintiff in this proceeding, respectfully prays that Defendant's, American Gems, Inc., Petition for Certiorari to the Fourth Circuit Court of Appeals to review that court's decision of January 3, 1980, be denied.

OPINIONS BELOW, AND JURSIDICTION

The Respondent accepts these portions of Petitioner's brief as presented.

QUESTIONS INVOLVED

Respondent submits that the "question involved" is more specifically stated as: Where an action is brought in the Federal Courts by a decedent's non-domicillary representa-

tive under North Carolina's wrongful death statute does the citizenship of the representative or of the statutory heirs and recipients of the proceeds control in determining diversity jurisdiction under 28 U. S. C. §1332.

STATEMENT OF FACTS

Respondent accepts Petitioner's statement.

ARGUMENT

Respondent asserts that, without enumerating the extensive authorities relied upon by the Court of Appeals below, that court held that regardless of whether or not a state's statutes require that the personal representation be a resident, the underlying reality, at least for this case, is that she is no more than a nominal party to the action. She is

present only becasue a statute says that this action for wrongful death must be prosecuted in the name of the representative. It is perhaps true that the facts of this case are unique in that the decedent had no assets in North Carolina, save the proceeds of the action. The decedent and all his statutory distributiees were Florida residents and the remainder of his estate is in that state, though unadministered. The only possible role of the Plaintiff here, therefore, is to bring the action and, if successful, distribute the proceeds as directed by law. In short, she has no possible "stake" in the outcome of the law suit.

The decision of the Court of

Appeals is consistent with previous holdings of both this Court, particularly Mecom vs. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931), and with others in the Fourth Circuit including Sadler v. New Hanover Memorial Hospital, 588 F. 2d 914 (4th Cir. 1978). The consistency lies in the role of the Plaintiff in each case, the possibility for or reality of collusive appointment to gain federal jurisdiction, and, as noted by the court below, "... the goal of such jurisdiction: 'the protection of the non-citizen who is obliged to sue or be sued in the state of his adversery: Miller (v. Perry), 456 F. 2d at 67", (Petition, Appendix B, p. 59).

True, it may be argued that the present status of the class of suits to which this case belongs, those brought by persons in representative capacity, is somewhat confusing. Both attorney and judge must be alert to the precise role of the particular representative because the determination of the "real parties in interest" seems to resolve around the actual powers of the particular representative and the opportunities present for collusive appointment in violation of 28 U. S. C. §1359. Given this situation, however, Respondent asserts that the decision below is correct. Plaintiff, under North Carolina law has no real powers whatsoever; her appointment was anything

but collusive and her "stake" in the outcome is zero - she probably is not entitled to even payment for use of her name as the recovery is not estate assets from which such a fee is collectible.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals is consistent with that Circuit's previous holdings and with decisions of the Court. No other basis set forth in Rule 19(1) of the Rules of the Supreme Court of the United States are involved here. The Petition should, therefore, be denied.

Respectfully submitted,

Creighton W. Sossomon
Attorney for Respondent
4 W. Main St.
Sylva, N. C. 28779
Phone: 704-586-5511

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this the 23rd day of April, 1980, filed the required copies of Respondent's Brief in Opposition to Petition for Certiorari in the Clerk's Office in Washington, D. C. and have mailed the required copies of Brief to Max F. Ferree, Attorney for Petitioners, Court Square, Wilkesboro, N. C. 28697.

Creighton W. Sossomon
Attorney for Respondent